

United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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In the Matter of CREECH BROTHERS LUMBER COMPANY, a Corporation, Bankrupt.

A. R. TITLOW, as Receiver of the UNITED STATES NATIONAL BANK OF CENTRALIA, Appearing in the Name and Stead of ROBERT G. CHAMBERS, as Trustee in Bankruptcy of the Estate of CREECH BROTHERS LUMBER COMPANY, a Corporation, Bankrupt,  
Petitioner and Appellant,

vs.

H. W. MACPHAIL,  
Respondent and Appellee.

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Petition for Revision

Under Section 24b of the Bankruptcy Act of Congress, Approved July 1, 1898, to Revise, in Matter of Law, an Order of the United States District Court for the Western District of Washington, Southern Division

AND

TRANSCRIPT OF RECORD

Upon Appeal from the United States District Court for the Western District of Washington, Southern Division.

Filed

MAY - 5 1915



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**Circuit Court of Appeals**  
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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*In the United States Circuit Court of Appeals for  
the Ninth Circuit.*

No. 2827.

In the Matter of CREECH BROTHERS LUMBER  
COMPANY, a Corporation, Bankrupt.

**Notice of Filing Petition for Review.**

To H. W. MacPhail and Messrs. Welsh & Welsh and  
M. M. Richardson, His Attorneys:

Please take notice that on the 12th day of July, 1916, at the hour of 10 o'clock in the forenoon, we will file in the clerk's office of the United States *Circuit of Appeals* for the Ninth Circuit, in the City of San Francisco, State of California, a petition for review in the above-entitled cause, a copy of which petition is annexed hereto and made a part of this notice.

OLDHAM & GOODALE,

Attorneys for Petitioner.

Office and Postoffice Address: 1408 Hoge Building,  
Seattle, King County, Washington.

We hereby acknowledge the receipt of copy of petition of A. R. Titlow, Receiver of the United States National Bank, acting in the name and stead of the trustee in bankruptcy, for review herein, and of notice thereof and service of the same this 6th day of July, 1916.

WELSH & WELSH,

M. M. RICHARDSON,

Attorneys for H. W. MacPhail.

*In the United States Circuit Court of Appeals for  
the Ninth Circuit.*

No. —

In the Matter of CREECH BROTHERS LUMBER  
COMPANY, a Corporation, Bankrupt.

**Petition to Review in Matters of Law Under Sec-  
tion 24B of the Bankruptcy Act.**

Your petitioner, A. R. Titlow, Receiver of the United States National Bank of Centralia, appearing herein in the name and stead of Robert G. Chambers, as trustee in bankruptcy of this estate, does hereby represent as follows:

A petition in involuntary bankruptcy was duly filed against the above-named Creech Brothers Lumber Company, a corporation, in the United States District Court for the Western District of Washington, Southern Division, on the 27th day of August, 1914, and such proceedings were thereafter had that that company was duly adjudicated a bankrupt in due course, on November 16, 1914, and on the 28th day of December, 1914, one Robert G. Chambers was duly appointed trustee of said bankrupt and is now the duly appointed, qualified and acting trustee.

That your petitioner is the receiver appointed by the Comptroller of the Currency of the United States of America, of the United States National Bank of Centralia, a national banking association organized and existing under the laws of the United States relative to such associations, which bank became insolvent on September 21, 1914, and a receiver therefor

was appointed on that date; that as such receiver your petitioner is a creditor of the above-named bankrupt in the sum of \$16,255.75, and his claim in that sum has been duly proved and allowed herein.

That on the 26th day of April, 1915, one H. W. MacPhail filed his proof of claim in said bankruptcy cause claiming to be entitled to a preferred claim against said estate in the sum of \$15,170.69, representing the amount of alleged advances made to the bankrupt corporation with interest thereon, which he claimed to have made pursuant to a certain instrument executed by the bankrupt on the 29th day of October, 1912. This instrument, together with the other instruments hereinafter referred to under which said claim is asserted, is attached to and made a part of MacPhail's proof of claim herein, which will be brought before this court as a part of the record in the court below, and is therefore not here set forth in full. In substance it is as follows:

It recites the insolvency of the lumber company and its inability to procure credit or operate its plant, and that MacPhail has signified his willingness to finance the operation of the plant, provided he could be protected for all sums advanced or contracted by him, and provided the creditors would extend the time of payment of their claims and desist from pressing said claims. It then provides that MacPhail is appointed the sole agent of the lumber company, to take charge of all of its property, with full authority to sell and dispose of it and to use the money obtained from the sale for the purpose of paying the indebtedness of the corporation or the operat-



ing expenses, or any other purpose for which MacPhail may deem it best to use such money, or for the purpose of enlarging or repairing the plant, giving MacPhail also the authority to borrow money or otherwise contract indebtedness in the name of the corporation, to purchase logs, employ labor, etc., on cash or on credit. It is provided that any sums advanced by the second party or any sums which he may contract as indebtedness in the operation of the plant or in the purchase of logs or employment of labor shall be a first and prior lien, and shall be paid prior to any sums now due the creditors of the company. MacPhail agrees to operate the plant for and in the name of the corporation as long as it can be operated at a net profit of \$1,000 or more per month, and that from the profits derived from the operation he shall first reimburse himself for any sums advanced, and shall next pay any indebtedness which he may contract, and the remainder he shall pay to the creditors pro rata, until all their claims have been paid, together with 8% interest, paying the surplus, if any, to the lumber company.

It is further provided that if the plant, when operated in a business like manner, shall not clear the sum of \$1,000 per month net, that MacPhail may at his option cease to operate it and sell and dispose of all of the property of the company for the purpose of first reimbursing himself for any sums advanced or any sums contracted in the operation of the plant; and, second, to pay the creditors of the lumber company in full or *pro rata*. MacPhail is also constituted the agent of the lumber company

to employ all necessary managers and agents and other persons for the purpose of carrying out the agreement, and agrees to accept the trust and to execute the same to the best of his ability.

This instrument was signed by the officers of the lumber company and by a majority of its stockholders.

The instrument of which the substance is hereinbefore set forth is marked exhibit "A," and attached to claimant's proof of claim. Certain other exhibits, "B-1," "B-2," "B-3," and "B-4," "C," and "D" are also attached thereto. The exhibits "B" referred to are all duplicates of each other except that the signers are different, such persons being different creditors of the corporation. This paper recites the insolvency of the lumber company and that the stockholders and trustees of the company have agreed to make an assignment to H. W. MacPhail for the benefit of all the creditors of the company, and that MacPhail has agreed to operate the plant as assignee and finance its operation, provided it can be operated at a profit and also provided the creditors will extend the time of payment of their accounts and desist from pressing them until they can be paid by the profits derived from the operation of the plant. It then provides that the undersigned creditors, in consideration of the assignment and MacPhail's agreement to finance the plant, severally agree that they will extend the time of payment of their claims and desist from pressing them in the courts or otherwise, so long as the plant can be operated at a monthly net profit of \$1,000 or more

per month. It is further provided that in the operation of the plant MacPhail shall first pay the cost of operation and all sums contracted by him as assignee and all sums advanced by him, and thereafter shall pay the creditors 8% interest, and the balance to the creditors pro rata upon their claims until all indebtedness is paid. The proof showed that there were a number of creditors who did not sign these exhibits "B."

Exhibits "C" and "D" above referred to purport to show advances made by MacPhail and expenditures on account of the corporation and sums received by him. According to these exhibits, MacPhail advanced \$13,877.71 more than he was repaid by the corporation, and he claims priority of payment for this sum, together with interest thereon.

Your petitioner, after requesting the trustee in bankruptcy to file objections to this claim and the trustee's refusal so to do, filed objections in the trustee's name and stead, after first procuring permission from the Court. A hearing was had before the referee, and on October 6, 1915, the referee entered an order disallowing the preferred claim without prejudice to MacPhail's right to file a general claim, or the trustee's right to sue MacPhail to recover preferences. MacPhail filed a petition for review which came on for hearing before the Honorable Jeremiah Neterer, Judge of the District Court, and on June 12, 1916, the District Court entered an order reversing the referee and awarding priority to MacPhail's claim in the principal amount claimed. A copy of this order is hereto annexed, marked exhibit



“A” and made a part of this petition.

Your petitioner thereupon made written demand upon the trustee in bankruptcy to take such steps as might be necessary to procure a review of said order, but the trustee refused to take such steps. Your petitioner then applied to the District Court, and by order entered on the 21st day of June, 1916, was permitted to take such proceedings in the name and stead of the trustee in bankruptcy.

The evidence before the referee and before the District Court showed, in addition to the facts hereinbefore referred to, that the United States National Bank of Centralia was not a creditor of the bankrupt at the time of the assignment to MacPhail, but subsequently became such; that certain of its officers, one Dysart and one Gilchrist, took some part in procuring signatures of various creditors to the exhibits “B” above referred to. It did not appear that these officers were acting for the United States National Bank at the time. It further appeared from the schedules of the bankrupt that there were a number of other creditors whose names did not appear as signers of exhibit “B.” Your petitioner, acting in the name and stead of the trustee in bankruptcy in both of the courts below, contended:

1. That as a matter of law exhibit “A” hereinbefore referred to gave MacPhail a right to priority of payment even as against the bankrupt only from profits or moneys realized upon the sale of the assets by him. The assets were not sold by him, but were sold in the bankruptcy proceedings, and the proof showed that he did not make any profits, but that on

the contrary the plant lost money while he was in charge of it.

2. That none of the creditors agreed that he should have a lien against the assets of bankrupt, some of the creditors merely assenting under exhibits "B" above referred to, to his reimbursing himself out of the profits, if he could make any, and agreeing to extend the time of payment of their claims and to desist from pressing them in the courts as long as MacPhail could make a profit of \$1,000 per month; these matters being matters of law arising upon the face of said exhibits "B."

3. That the facts above referred to showing the assent of certain officers of the United States National Bank to the arrangement with MacPhail are as a matter of law insufficient to show the assent of the bank.

4. That whether or not the bank assented is immaterial, since the rights asserted by your petitioner are those of the trustee in bankruptcy; that such rights are superior to those of MacPhail under the instruments above referred to, since it was undisputed that none of these instruments had been filed or recorded as required by the statutes of the State of Washington in order to give effect to the lien thereby purported to be created.

Your petitioner's contentions upon these various points were overruled by the District Court in the order complained of (to which due exception was taken), and your petitioner states that for these reasons such order is erroneous and unjust to the trustee in bankruptcy and to each and every one of the

creditors of this estate and to the United States National Bank of Centralia and its receiver.

All of the facts hereinbefore set forth will be made to appear unto your Honors by a transcript of the record in the District Court, which will be transmitted to this court and which is hereby made a part of this petition, and your petitioner states that the questions arising upon the face of said record are questions of law and do not involve any disputed question of fact.

WHEREFORE your petitioner prays that said order of the United States District Court for the Western District of Washington, Southern Division, be reviewed, revised and reversed, and the District Court and the Referee in Bankruptcy be ordered to disallow priority to said claim; and for such other and further relief as your petitioner may be entitled to in equity.

OLDHAM & GOODALE,

Attorneys for Petitioner.

Office and Postoffice Address: 1408 Hoge Building,  
Seattle, King County, Washington.

State of Washington,  
County of King,—ss.

A. R. Titlow, being first duly sworn, on oath deposes and says:

That he is the receiver of the United States National Bank of Centralia, Washington, and is the petitioner in the foregoing petition for review, and filed such petition in the name and stead of Robert G. Chambers, trustee in bankruptcy of Creech Brothers Lumber Company, bankrupt; that he has



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read the foregoing petition, knows the contents thereof, and that the same is true.

A. R. TITLOW.

Subscribed and sworn to before me this 5th day of July, 1916.

[Seal]             WALTER L. N. OSSAMAN,  
Notary Public in and for the State of Washington,  
Residing at Seattle.

**Exhibit "A"—Order Allowing Claim of H. W.  
MacPhail.**

*In the District Court of the United States for the  
Western District of Washington, Southern Divi-  
sion.*

No. 1627.

In the Matter of CREECH BROTHERS LUMBER  
COMPANY, a Corporation, Bankrupt.

This cause duly came on for hearing on the 25th day of March, 1916, upon the petition of H. W. MacPhail to review an order of the referee in bankruptcy entered herein on the 6th day of October, 1915, disallowing the preferred claim sought to be established by the said H. W. MacPhail. The cause was argued by counsel, and now, upon consideration thereof, it is

ORDERED, that the claim of said H. W. MacPhail be, and it is hereby allowed as preferred in the sum of thirteen thousand eight hundred seventy-seven & 74/100ths dollars (\$13,877.74).

To all of which A. R. Titlow, receiver of the United States National Bank, a creditor of this estate appearing herein and objecting to the allowance of such claim in the name and stead of the trustee in

bankruptcy, with leave of Court first obtained upon the refusal of the trustee in bankruptcy so to do, duly excepted in the name and stead of the trustee, and such exceptions are allowed.

Done in open court this 12th day of June, 1916.

JEREMIAH NETERER,

Judge.

And the said A. R. Titlow, in the capacity hereinbefore mentioned, further specifically excepted to the foregoing order upon the following grounds, to wit:

1. Upon the ground that under the instruments upon which MacPhail relies for priority, to wit: Exhibits "A," "B-1," "B-2," "B-3," and "B-4," attached to MacPhail's proof of claim, he could claim priority of payment even as against the bankrupt only from profits or from moneys realized from the sale of the assets by him, and that the only assent given by the creditors was that some of them assented to MacPhail's reimbursing himself out of the profits of the operation of the plant, if he made any, and such creditors agreed only to extend the time of payment of their claims and desist from pressing them as long as MacPhail could make a profit of \$1,000 or more per month, and that not all of the creditors assented even to that extent.

2. That the evidence and the facts found are insufficient as matter of law to charge the United States National Bank with notice or to imply assent on its part to the arrangement for giving MacPhail priority, and for the further reason that the objecting creditor is here asserting the rights of the trustee

in bankruptcy, and therefore no estoppel against any particular creditor, even if such existed, is material.

3. For the further reason that the conveyance or assignment to MacPhail, being an instrument creating a lien and not being filed, recorded, executed or acknowledged as required by the statutes of the State of Washington, is invalid as against the trustee in bankruptcy and the creditors of this estate.

4. For the further reason that under the evidence and the facts found by the Court, MacPhail is as a matter of law not entitled to a preferred claim in the sum of \$13,877.74 or any other sum.

The foregoing exceptions presenting questions of law which were urged before this court upon the hearing of MacPhail's petition to review the order of the Referee in Bankruptcy disallowing his preferred claim are hereby allowed this 12th day of June, 1916.

JEREMIAH NETERER,  
Judge.

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[Endorsed]: No. 2827. United States Circuit Court of Appeals for the Ninth Circuit. In the Matter of Creech Brothers Lumber Company, a Corporation, Bankrupt. A. R. Titlow, as Receiver of the United States National Bank of Centralia, Appearing in the Name and Stead of Robert G. Chambers, as Trustee in Bankruptcy of the Estate of Creech Brothers Lumber Company, a Corporation, Bankrupt, Petitioner, vs. H. W. MacPhail, Respondent. Petition for Revision Under Section 24b of the



Bankruptcy Act of Congress, Approved July 1, 1898,  
to Revise, in Matter of Law, an Order of the United  
States District Court for the Western District of  
Washington, Southern Division.

Filed July 12, 1916.

FRANK D. MONCKTON,  
Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

By Paul P. O'Brien,  
Deputy Clerk.

